CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Edward Diamontiney concerning the Department of Corrections' "Administrative Manual," sections 510, 511, 536, 537, 538, 539, 540 and 541 (regarding subpoenas and inmate litigation)[1]	1989 OAL Determination No. 11 [Docket No. 88-014] July 25, 1989 Determination pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2

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SYNOPSIS

The issue presented to the Office of Administrative Law is whether certain sections of the Department of Corrections' "Administrative Manual," concerning inmate "legal matters," such as subpoenas for inmate records and procedures for inmate litigation, are "regulations" required to be adopted in compliance with the Administrative Procedure Act.

The Office of Administrative Law concludes that the Department of Corrections has failed to comply with the Administrative Procedure Act in establishing rules and procedures that implement, interpret or make specific statutory or regulatory law. The Office of Administrative Law further concludes, however, that most of the challenged provisions of the "Administrative Manual" are either non-regulatory or exempt from the requirements of the Administrative Procedure Act.

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether certain sections of the Department of Corrections' ("Department") "Administrative Manual," concerning inmate "legal matters"--specifically section 510 ("Subpoenas for Inmate Records"), section 511 ("Subpoenas for Other Records"), section 536 ("Policy"), section 537 ("Staff Assistance to Inmates"), section 538 ("Notarization of Legal Documents"), section 539 ("Legal Copying Services"), section 540 ("Legal Documents Defined"), and section 541 ("Abuse of Legal Copying Services")--(1) are "regulations" as defined in Government Code section 11342, subdivision (b), (2) are subject to the requirements of the Administrative Procedure Act ("APA"), and therefore (3) violate Government Code section 11347.5, subdivision (a).[4]

THE DECISION [5,6,7,8]

OAL concludes that:

I. Certain provisions of the "Administrative Manual" which establish rules and procedures that implement, interpret, or make specific statutory or regulatory law (1) are "regulations" as defined in the APA,[9] (2) are subject to the requirements of the APA, and therefore (3) violate Government Code section 11347.5, subdivision (a). These provisions are section 538 (except subsection 538(b)), subsections 539(a) (second and third sentences), 540(b) and 541(a).

II. Portions of the "Administrative Manual," though "regulations" as defined in the key provision of the APA, are nonetheless exempt from the procedural requirements of the APA because they relate solely to the internal management of the Department. These provisions are subsection 510(a)(1), section 511 and subsection 541(b).

III. Portions of the "Administrative Manual" (1) are not "regulations" as defined in the APA, and (2) are not subject to the requirements of the APA because they reiterate existing statutes, regulations or case law. These provisions are subsection 510(a)(2), sections 536 and 537, subsections 538(b), 539(a) (first sentence), 539(b)-(d) and 540(a).

I. AGENCY, AUTHORITY, APPLICABILITY OF APA; BACKGROUND

Agency

California's first, and for many years only, prison was located on San Francisco Bay at San Quentin. As the decades passed, additional institutions were established, leading to an increased need for uniform statewide rules. Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.[10] The Legislature has entrusted the Director of Corrections with a "difficult and sensitive job,"[11] namely:

> "[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein . . . ."[12]

Authority [13]

Penal Code section 5058, subdivision (a), as amended in 1976, provides in part:

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . ." [Emphasis added.]

Applicability of the APA to Agency's Quasi-Legislative Enactments

Penal Code section 5058, subdivision (a), provides in part:

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA] . . . ." [Emphasis added.]

In any event, the APA generally applies to all state agencies, except those "in the judicial or legislative departments."[14] Since the Department is in neither the judicial nor the legislative branch of state government, the APA rulemaking requirements generally apply to the Department.[15,16]

General Background: The Department's Three Tier Regulatory Scheme

The Department of Corrections was traditionally considered exempt from codifying any of its rules and regulations in the California Code of Regulations (CCR). Dramatic changes to this policy have occurred in the past 15 years, in part reflecting a broader trend in which legislative bodies have addressed "deep seated problems of agency accountability and responsiveness"[17] by generally requiring administrative

agencies to follow certain procedures, notably public notice and hearing, prior to adopting administrative regulations. "The procedural requirements of the APA," the California Court of Appeal has pointed out, "are designed to promote fulfillment of its dual objectives--meaningful public participation and effective judicial review."[18] Some legislatively mandated requirements reflect a concern that regulatory enactments be supported by a complete rulemaking record, and thus be more likely to withstand judicial scrutiny.[19]

The Department has for many years used a three-tier regulatory scheme to carry out its duties under the California Penal Code. The first tier consists of the "Director's Rules," a relatively brief collection of statewide "general principles," which were adopted pursuant to the APA and are currently contained in about 225 CCR pages. The Director's Rules were placed in the CCR in response to a legislative mandate in 1976 which explicitly directed the Department to adopt its rules as regulations pursuant to the APA.

The second tier consists of the "family of manuals," a group of six "procedural" manuals containing additional statewide rules supplementing the Director's Rules.[20] The manuals are the Classification Manual, the Departmental Administrative Manual, the Business Administration Manual, the Narcotic Outpatient Program Manual, the Parole Procedures Manual-Felon, and the Case Records Manual. In this determination proceeding, sections of the Departmental Administrative Manual ("Administrative Manual") are at issue.

Manuals are updated by "Administrative Bulletins," which often include replacement pages for modified manual provisions. Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, Division 3, Title 15 of the CCR states in part:

> "Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures."

Court decisions have struck down portions of the second tier--the Classification Manual[21] and parts of the Administrative Manual[22]--for failure to comply with APA requirements.[23] OAL regulatory determinations have found the Classification Manual,[24] several portions of the Administrative Manual,[25] and two sections and several chapters of the Case Records Manual[26] to violate Government Code section 11347.5.

The third tier of the regulatory scheme consists of hundreds (perhaps thousands) of "operations plans," drafted by indi-

vidual wardens and superintendents and approved by the Director.[27] These plans often repeat parts of statutes, Director's Rules, and procedural manuals.[28]

Background: This Determination

The following undisputed facts and circumstances have given rise to the present determination.

The Requester, Edward Diamontiney, a prisoner in the custody of the Department at Folsom Prison, filed a Request for Determination with OAL on August 23, 1988. Mr. Diamontiney identified sections 510, 511, and 536 through 541 of the Administrative Manual as "regulations" issued by the Department in violation of section 11347.5, subdivision (a) of the Government Code. Mr. Diamontiney alleged that "it may be that the requester has been hindered in his access right to the courts" by Department personnel who rely upon the challenged rules in their administration of the prisons.

On April 7, 1989, OAL published a summary of the Request for Determination in the California Regulatory Notice Register, along with a notice inviting public comment.[29]

OAL received the Department's Response to the Request for Determination on May 22, 1989. The Department denied that the challenged rules constitute an exercise of quasi-legislative power by a state agency and summarized its position regarding the Request as follows:

1. Portions of the challenged rules which repeat or paraphrase case law, statutes or regulations do not constitute an exercise of quasi-legislative power by a state agency.

2. Assuming arguendo that the challenged rules meet the definition of a "regulation," they fall within the internal management exception.

II. DISPOSITIVE ISSUES

There are two main issues before us:[30]

(1) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(2) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b) defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . which is a [']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in Government Code section 11342, subdivision (b) involves a two-part inquiry:

First, is the informal rule either

- a rule or standard of general application or
- a modification or supplement to such a rule?

Second, has the informal rule been adopted by the agency to either

- implement, interpret, or make specific the law enforced or administered by the agency or
- govern the agency's procedure?

The answer to the first part of the inquiry is "yes."

For an agency rule to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[31] It has been judicially held that "rules significantly affecting the male prison population" are of "general application."[32] The challenged rules affect the processing of subpoenas presented to the Depart-

ment to obtain inmate records and the assistance provided to inmates by the Department to assure that they have meaningful access to the courts. These rules apply throughout the prison system administered by the Department.

The answer to the second part of the inquiry depends upon whether (1) the challenged rules merely restate existing law or (2) establish a rule different from or additional to existing law. To the extent that a challenged standard of general application implements, interprets, or makes specific the law enforced or administered by the Department, or governs its procedure, the rule is a "regulation." The Department argues that the "rules provide a convenient collection of applicable case law, statutes, regulations from the California Code of Regulations (CCR), 'internal management' rules and other helpful nonregulatory information."[33]

We will now proceed to examine each of the challenged rules for the purpose of determining whether the standards of general application contained in the rules implement, interpret, or make specific the law enforced or administered by the Department, or govern its procedure. Since the rules are short, and any discussion of excerpts from the rules might be confusing to the reader, the rules will be set forth in their entirety.

The Challenged Rules

1. "Section 510. Subpoenas for Inmate Records.

> "(a) Subpoenas for inmate records shall always be referred to the AG except under the following circumstances:
>
> "(1) The subpoena was issued by the inmate's own attorney. The attorney shall be informed of departmental procedures for disclosure with the inmate's written consent. If the attorney is unwilling to follow the Department's procedures for reviewing his/her client's file, the matter shall be referred to the Departmental Counsel.
>
> "(2) Inmate medical records are sought in a civil action, not involving the Department, where the inmate is a party. Notice shall be given to the inmate prior to the disclosure." [Emphasis in original.]

Subsection 510(a)(1) is a rule which governs the Department's procedure in circumstances where it receives a subpoena for inmate records. It has been issued by the Department to direct the activities of Department personnel as they supervise, manage and control the state prisons. We note that section 5054 of the Penal Code assigns responsibility for care, custody, treatment, training, discipline and employment

of persons confined in the state prisons to the Director of the Department. Manual subsection 510(a)(1) implements measures to control the release of inmate medical records, an activity which is part of the administration of the prison system, and is therefore a "regulation."

Subsection 510(a)(2) restates statutory law. This subsection seems to imply that inmate medical records sought in a civil action, where the inmate is a party and the Department is not a party, will be furnished by the Department pursuant to subpoena. This implication is based upon the observation that the challenged rule does not provide for referral of such subpoenas to the Department's attorneys.

The Department argues in its Response[34] that section 56.10, subdivision (b)(3) of the Civil Code requires providers of health care to disclose medical information if the disclosure is compelled by a subpoena, and that the challenged rule simply restates existing law as it applies to the Department. We agree with the Department. The challenged rule actually goes beyond the provisions of section 56.10 of the Civil Code by providing for notice to inmates prior to disclosure of the information; however, we note that such notice is required by the Information Practices Act, Civil Code section 1798.24, subdivision (k). Manual subsection 510(a)(2) is not a "regulation" because it restates existing law and does not implement, interpret, or make specific any provision of law administered by the Department.

2. "Section 511. Subpoenas for Other Records.

> "(a) Subpoenas for Public Records, such as a copy of a non-confidential institution operating procedure, shall be handled by informing the person issuing the subpoena of the method to secure public records as outlined in this manual.
>
> "(b) Subpoenas for other records, such as copies of incident reports or confidential procedures, shall be referred to the AG."

Like subsection 510(a)(1), section 511 also implements Penal Code section 5054. Section 511 specifies the particulars of one small aspect (procedures for dealing with subpoenas) of the care of persons confined in the state prisons and therefore constitutes a "regulation."

3. "Section 536. Policy.

> "(a) State and federal law guarantees an inmate access to the courts to litigate issues related to conviction or confinement. An inmate may bring a lawsuit, or be sued, like any other person.

> "(b) No inmate shall be disciplined or punished, in any way, solely for instituting or maintaining a lawsuit. Perjury can be referred for criminal prosecution. Sanctions can be imposed only by the courts, not by individual personnel, if an inmate abuses his/her right of access to the courts."

Section 536 has several features which distinguish it from sections 510 and 511, which specify departmental procedures. In its Response,[35] the Department states that "DAM [the Administrative Manual] section 536, entitled 'Policy,' paraphrases Penal Code Sections 118(a) [sic] and 2601, and [Title] 15 CCR Sections 3003 and 3021."

Looking first at subsection (a) of section 536, we see that although it is contained in the Administrative Manual which is used throughout the state, subsection (a) is not a "regulation." Subsection 536(a) can be most aptly described as information concerning existing law. For example, Ex parte Hull[36] is the seminal United States Supreme Court decision usually cited for the proposition that "While the constitutionality of restricting access to file civil suits may remain somewhat in doubt, that of access to [courts to] challenge the legitimacy, duration, and conditions of confinement does not. This right, grounded in the Due Process Clause, may not be abridged nor impaired by prison officials."[37] Additionally, Penal Code section 2601, subdivision (e) provides that each inmate shall have the civil right "To initiate civil actions."[38]

The Department also argues that Manual section 536 restates Title 15, CCR, sections 3003 and 3021. We reject these arguments. The Department's Response was filed with OAL on May 22, 1989. Section 3003 was repealed and renumbered in an emergency rulemaking action, effective May 18, 1989.[39] It concerned solely administrative appeals or grievances filed by inmates.[40] Such administrative appeals are not equivalent to "lawsuits." CCR section 3021 prohibits an inmate or parolee from entering or introducing false information into or upon any record or document maintained by the Department. This CCR section is unrelated to the provisions contained in Manual section 536.

By contrast, subsection 536(b) does contain standards related to discipline and punishment. However, these standards do not implement, interpret, or make specific the law enforced or administered by the Department, or govern its procedure. Rather, they can best be characterized as restatements of existing law, without interpretation. For example, a leading authority in the area of prisoners' rights law states that as a matter of federal constitutional law,

> ". . . inmates may not be penalized for exercise of their right of access to courts or, for that matter, any

other constitutionally protected right. Neither direct sanction, such as confinement to solitary [footnote omitted] or loss of privileges, [footnote omitted] nor indirect ones, such as parole board consideration of active litigation, [footnote omitted] will be tolerated. [Footnote omitted.]"[41]

Subsection 536(b) restates Penal Code section 118a, which provides, in summary, that any person who, in an affidavit, swears, affirms, or declares that any material matter contained in the affidavit is true, but in fact knows it to be false, is guilty of perjury.

Title 15, CCR, section 3160 states in part "Inmates will be allowed unrestricted access to the courts" (emphasis added), thereby implying that the Department will not impose sanctions if an inmate abuses his/her right of access to the courts. Additionally, in Ex parte Hull,[42] the United States Supreme Court held that the propriety of a legal document is to be determined by the court to which it is addressed, not by prison officials.[43]

Though the provision prohibiting disciplinary action and punishment of inmates based upon their instituting or maintaining a lawsuit may have the appearance of a rule concerning departmental procedure, it can more accurately be described as a simple instruction to the Department's staff, making note of the pre-existing law on the right of prisoners concerning access to the courts, and requiring compliance with the law.[44]

4. "Section 537. Staff Assistance to Inmates.

"Employees shall not assist an inmate/parolee in preparation of any legal document, except as provided in Director's Rule 3160. Staff shall not give any form of legal advice. Employees are allowed to help inmate/parolees find qualified assistance for their legal problems."

We note that this challenged rule identifies Director's Rule 3160--section 3160 of Title 15 of the CCR--as the regulation which specifies the law on departmental staff assistance to inmates. Title 15, CCR, section 3405 also applies. Section 3160 provides:

"Inmates will be allowed unrestricted access to the courts. The department is neither equipped nor authorized to assist inmates in their legal efforts except to provide staff assistance to inmates who are illiterate or otherwise physically incapable in the preparation of forms adopted under rules of the United States courts and the Judicial Council of California for petitions for

habeas corpus or modification of custody." [Emphasis added.]

Section 3405 provides:

> "Employees must not assist an inmate or parolee in the preparation of any legal document, or give any form of legal advice or service, except as specifically authorized by the warden, superintendent or regional administrator. Employees should help inmates and parolees to find qualified assistance for their legal problems." [Emphasis added.]

The first sentence of Manual section 537 in part restates a portion of the second sentence of section 3160. Manual section 537's references to "parolees" in addition to "inmates" appear at first glance to present APA problems. However, the two references to "parolees" merely restate CCR section 3405.

The second sentence of section 537 bars departmental staff from giving any form of legal advice. This adds very little to CCR section 3160 which, in essence, already provides that legal advice is not available from departmental staff. As the Department has noted in its Response to this Request for Determination,[45] furnishing legal advice constitutes the practice of law, and section 6125 of the Business and Professions Code prohibits the practice of law by persons who are not active members of the State Bar. The last sentence of Manual section 537 can in part be classified as a clarification of the rule prohibiting departmental staff from giving legal advice. It is based upon the right of prisoners to have access to the courts and adds no new meaning to the existing body of law.

Manual section 537 does not supplement or modify the provisions of CCR sections 3106 and 3405, and therefore is not a "regulation."

5. "Section 538. Notarization of Legal Documents.

> "(a) Each institution shall have at least one employee commissioned as a notary public available during regular business hours. Upon request of an inmate or inmate's attorney, notary service shall be provided upon payment of the established notary fees.
>
> "(b) No notary services will be provided without charge as the courts provide alternatives to notarization. Under California Code of Civil Procedure [section] 2015.5 and Title 28, U.S. Code [section] 1746, documents can be filed with a declaration under penalty of perjury.
>
> "(c) Notarization services shall be provided as expeditiously as possible, consistent with security and other

institutional needs. Notarization shall not be delayed by requiring that documents be submitted through institutional mail.

"(d) A notary shall not read a document to witness the signature, other than to ascertain the title or description of the document for the notary's record book and to ensure the person whose signature is being witnessed signs in front of the notary."

Subsection (a) of Manual section 538 implements subsection 3165(c) of Title 15 of the CCR. Subsection 3165(c) provides:

"Notarization of legal documents is not normally required by the courts and will not be provided as a free service to any inmate, indigent or not. Inmates must pay the established notary fee for such service." [Emphasis added.]

The reasonable implication of subsection 3165(c) is that notary service is available to inmates. Manual subsection 538(a) implements this provision by specifying the minimum number of notaries which must be available at each institution. Subsection 538(a) is therefore "regulatory."

Manual subsection 538(b) restates subsection 3165(c) of Title 15, CCR, and provides the Department's rationale of why notarization of papers filed with the courts is unnecessary. Subsection 538(b) adds nothing to existing law.

Manual subsection 538(c) establishes a rule concerning the promptness with which the institutions must furnish notarial services. It is a "regulation" because it interprets subsection 3165(c) of Title 15, CCR.

Subsection 538(d) concerns the manner in which a notary performs certifications. The challenged rule's prohibition on reading documents presented for notarization may be intended to implement the right of inmates to correspond confidentially with courts, which is set forth in section 3141 of Title 15, CCR. Section 3141, which is entitled "Confidential Correspondence," provides in part:

"(a) Inmates . . . may correspond confidentially with the persons or the staff members of the persons listed in subsection (c) of this section. Confidential correspondence means that the correspondence shall not be read by any employee except as prescribed in Section 3142.

". . . .

"(c) Persons and staff members of persons with whom inmates may correspond confidentially include:

". . . .

"(4) All state and federal judges and courts."

Nevertheless, subsection 538(d) is more specific than subsection 3141(c) because it deals with the particular subject of notarization, which is not expressly mentioned in section 3141(c). Subsection 538(d) is also probably broader in scope than section 3141(c) because it seems to apply to all notarizations performed by Department personnel, although its provisions were perhaps originally intended to be limited to notarization connected with inmate litigation. Manual subsection 538(d) is a "regulation" because it supplements section 3165(c), which requires that notarial services be available, and section 3141(c), which establishes the right of inmates to correspond confidentially with persons who are members of certain enumerated groups.

6. "Section 539. Legal Copying Services.

"(a) Copy services are provided as a convenience for inmates in preparing legal documents. The number of copies required for filing with the courts shall be provided. The inmate shall also be provided with one copy of the legal documents for his/her records and one additional copy of a petition for a Writ of Habeas Corpus to be filed in state court shall be provided for mailing to the District Attorney.

"(b) Printed forms required by state and federal courts which are made available by the courts to the Department shall be provided without charge to inmates.

"(c) Inmates shall be required to pay for necessary duplication of printed forms and other written or typed materials, special paper, envelopes, and postage for mailing to the courts, except as noted in this section.

"(d) Indigent inmates. Materials and services described above shall be provided at no charge when an inmate is without funds, and so remains for 30 days after such materials or services are provided."

Section 3162 of Title 15, CCR, provides as follows:

"Printed copies of forms required by state and federal courts, which are made available to the department by the courts, will be provided without charge to inmates. Inmates will be required to pay for necessary duplication of printed forms or other written or typed materials, special paper, and envelopes required for mailing

to the courts. An exception will be made when an inmate is without funds at the time materials and services are requested and remains without funds for 30 days after such materials and services are provided. Under this exception, the institution will not seek reimbursement from the inmate for the cost of materials and services provided."

With the terms of CCR section 3162 in mind, we see immediately that certain provisions of Manual section 539 are not "regulatory" because they simply restate CCR section 3162. Manual subsections 539(b), 539(c) and 539(d) are virtually identical to CCR section 3162, and therefore are not "regulations." Additionally, the first sentence of Manual subsection 539(a) is not "regulatory." It does not supplement CCR section 3162. Section 3162 clearly implies that copy services will be available. The remainder of Manual subsection 539(a), however, is "regulatory" because it further interprets or supplements (e.g., provides additional specificity for) the term "necessary duplication," as that term is used in CCR section 3162.

7. "Section 540. Legal Documents Defined.

"(a) The following are considered legal documents for the purposes of providing copy services:

(1) Writs - habeas corpus, mandate, etc;

(2) Civil rights complaints;

(3) Civil complaints, or answers;

(4) Petitions for Hearing in Appellate Court;

(5) Appeal briefs;

(6) Motions to proceed in forma pauperis;

(7) Exhibits, including slip opinions of the California Courts of Appeal when attached to Petitions for Hearing [sic] in the California Supreme Court.

"(b) The following are considered non-legal documents, for the purposes of providing legal copying services to inmates, and shall not be copied for inmates:

(1) Law book pages;

(2) Law review articles;

(3) Court transcripts;

(4) Correspondence with attorneys or public officials;

(5) Slip opinions, except as noted in (a)(7) above."

Manual subsection 540(a) presents a list of seven categories of legal documents, each of which is a pleading or a document which may be necessary in a court proceeding. The effect of the inclusion of these documents on the list is that inmates will be able to obtain necessary copies of the documents pursuant to section 3162 of Title 15, CCR ("Printed copies of forms required by state and federal courts . . . will be provided without charge to inmates. . . ."). It is indisputable that subsection 540(a) is more specific than CCR section 3162, but this alone does not transform the challenged rule into a "regulation." It is our view that subsection 540(a) does not modify existing law because an individual involved in any legal proceeding which calls for the use of any of the seven listed documents must be able to obtain copies of them. The state's refusal to provide such copies would effectively frustrate the constitutional right of prisoners to have access to the courts.[46] The state has no choice but to make such copies available. For these reasons, subsection 540(a) is not a "regulation."

Subsection 540(b) is a rule which denies prisoners copying services for five categories of papers or documents. Unlike the list in subsection 540(a), this list is comprised of papers and documents which are not always essential to participation in court proceedings. Existing law neither generally requires nor generally prohibits the copying of such papers and documents. Subsection 540(b) supplements the provisions of section 3162 of Title 15, CCR, concerning duplication of written and typed materials and thus is a "regulation."

8. "Section 541. Abuse of Legal Copying Services.

"(a) Copy services shall be restricted when an inmate abuses the services to the extent that other inmates are deprived of such services or an unnecessary expense to the state results. Materials and services necessary for access to legal reference materials, attorneys and the courts shall be provided.

"(b) Authority to restrict services shall not be delegated below the level of Correctional Captain or Program Administrator. Reasons for the restriction of services shall be documented by utilizing a CDC Form 128-A."

Manual section 541 specifies when copying services shall be restricted, who may restrict services, and the manner of

documenting the reasons for such restrictions. Section 541 provides interpretations of the law which go beyond section 3162 of Title 15, CCR, which addresses only the matter of payment for necessary duplication. No other provisions of law have been identified which establish equivalent or similar standards. Manual section 541 is a "regulation" adopted by the Department to carry out its responsibility for the custody and discipline of persons confined in the state prisons as provided by section 5054 of the Penal Code, and further interprets section 3162 of Title 15, CCR.[47]

WE CONCLUDE THAT MANUAL SECTIONS 510(a)(1), 511, 538 (EXCEPT SUBSECTION 538(b)), 539(a) (SECOND AND THIRD SENTENCES), 540(b), AND 541 ARE "REGULATIONS" AS DEFINED IN GOVERNMENT CODE SECTION 11342, SUBDIVISION (b), BUT THAT SECTIONS 510(a)(2), 536, 537, 538(b), 539(a) (FIRST SENTENCE), 539(b)-(d), and 540(a) ARE NOT BECAUSE THESE LATTER PROVISIONS RESTATE EXISTING LAW.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULES FALL WITHIN ANY ESTABLISHED EXCEPTION TO APA REQUIREMENTS.

Rules concerning certain activities of state agencies are not subject to the procedural requirements of the APA.[48] Are any of the provisions found to be "regulations" nonetheless exempt from APA rulemaking requirements? Only one established exception is arguably applicable--the internal management exception.

Government Code section 11342, subdivision (b)'s definition of "regulation" contains the following specific exception to APA requirements:

> "'Regulation' means every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, except one which relates only to the internal management of the state agency . . . ." [Emphasis added.]

The internal management exception has been judicially determined to be narrow in scope.[49] A brief review of relevant case law demonstrates that the "internal management" exception applies if the "regulation" at issue (1) affects only the employees of the issuing agency,[50] and (2) does not address a matter of serious consequence involving an important public interest.[51]

In Poschman v. Dumke,[52] the court held that a Board of Trustees of California State Colleges rule dealing with tenure was not exempt from the APA because

> "Tenure within any school system is a matter of serious consequence involving an important public interest. The consequences are not solely confined to school administration or affect only the academic community."[53] [Emphasis added.]

In Armistead v. State Personnel Board,[54] the California Supreme Court held that a State Personnel Board rule limiting the withdrawal of resignations by state employees was a "regulation" and subject to the APA. The Court rejected the State Personnel Board's argument that the rule was exempt from the APA as internal management because, the court stated,

> "[the rule] is designed for use by personnel officers . . . in the various state agencies throughout the state. . . . It concerns . . . a matter of import to all state civil service employees. . . ."[55] [Emphasis added.]

Ligon v. State Personnel Board[56] dealt with a State Personnel Board memorandum which detailed the procedures and standards by which other state agencies could consider an employee's "out of class" experience for purposes of advancement and promotion within the other agencies. The court's holding that the memorandum constituted a "regulation" was based on the implicit recognition that the challenged policy affected employees throughout the state system.

In Stoneham v. Rushen,[57] the Court held that the Department of Correction's issuance of "administrative bulletins" implementing a standardized classification and transfer system for prisoners did not constitute "internal management" because the scheme extended

> ". . . well beyond matters relating solely to the management of the internal affairs of the agency itself. Embodying as it does a rule of general application significantly affecting the male prison population in the custody of the Department, such a comprehensive classification system is not exempt as a rule of internal management from mandatory compliance with the Act [APA]."[58] [Emphasis added.]

Determining whether the challenged Manual sections come within the "internal management" exception involves a two-part inquiry:

> FIRST, DOES THE CHALLENGED RULE AFFECT ONLY THE EMPLOYEES OF THE ISSUING AGENCY?

SECOND, DOES THE CHALLENGED RULE ADDRESS A MATTER OF SERIOUS CONSEQUENCE INVOLVING AN IMPORTANT PUBLIC INTEREST?

First Inquiry

In regards to section 538 (except subsection (b)), and subsections 539(a) (second and third sentences), 540(b) and 541(a), the answer to the first part of the inquiry is "no." These Manual provisions all significantly affect the rights of prisoners with regard to notarization and copying of documents. We see that the effects of these regulations are not limited to the employees of the Department. We need not proceed with the second part of the inquiry concerning the importance of the public interests affected by these Manual provisions because the provisions clearly do not affect only the employees of the issuing agency (the Department).

What about the other three Manual provisions previously found to be "regulations"--sections 510(a)(1), 511 and 541(b)? Do these provisions directly affect only employees of the issuing agency? We conclude that the answer to this question is "yes."

Under our prior analysis, Manual subsection 510(a)(1) was found to be "regulatory" because, in implementing Penal Code section 5054, it established the procedures to be followed by employees of the Department upon receipt of a subpoena. The procedures require referral of the subpoena to the Attorney General, with certain specified exceptions.

However, the routing of subpoenas, or any other legal documents served upon the Department, to the Attorney General, departmental counsel, or elsewhere within the Department is a matter which only directly affects employees of the Department.

What about Manual section 511? Section 511 specifies the steps to be followed by Department personnel upon receipt of subpoenas for public records. Only employees of the Department are directly affected.

What about Manual subsection 541(b)? This provision states that the authority to restrict copying services shall not be delegated to departmental personnel below the level of Correctional Captain or Program Administrator, and that the reasons for restriction shall be documented on CDC Form 128-A. Only employees of the Department are directly affected by this provision.

Second Inquiry

Do Manual sections 510(a)(1), 511 or 541(b) address a matter of serious consequence involving an important public inter-

est? Before attempting to answer that question, let us review prior findings concerning this legal issue.

In addition to the rule concerning tenure in Poschman v. Dumke (discussed above), the following are examples of "challenged rules" that have been found to involve a matter of serious consequence involving an important public interest.

In 1988 OAL Determination No. 3,[59] we explored the issue of whether the State Board of Control's ("Board") policy, requiring psychotherapy expenses claimed at certain hourly rates to be reviewed by the Board prior to reimbursement of victims of crime under the Victims of Crime Act, was a "regulation." In that Determination, one factor that clearly substantiated the existence of an "important public interest" was the Legislature's express statement of intent:

> "The Legislature has clearly stated [in Government Code section 13959] that there is a public interest in assisting Californians in 'obtaining restitution for the pecuniary losses they suffer as a direct result of criminal acts.'"[60] [Emphasis added.]

In 1988 OAL Determination No. 6,[61] we found that Chapter 7300 of the Department's Administrative Manual, which governs inmate/parolee grievance procedures, involved a significant public interest. The nature of the public interest involved was reflected in sections 7300 and 7301 of the Manual and was summarized in the Determination as "The need to resolve inmate grievances quickly and fairly within the prison system, thus making it unnecessary to expend significant resources litigating such matters in state or federal court." (Emphasis added.)

In the matter at hand, Manual subsection 510(a) appears to have no substantial effect upon the rights of anyone under the law and no effect upon the agency's response to a subpoena after the internal procedures have been followed. We conclude, therefore, that subsection 510(a) is not a matter of serious consequence involving an important public interest.

In regards to Manual section 511, although other persons may be indirectly affected by the manner of the Department's response to subpoenas, that effect is too remote to bring the Department's internal procedures for handling subpoenas under the APA. So long as the Department follows existing laws in responding to subpoenas, its internal procedures for handling them do not implicate a matter of serious consequence involving an important public interest.

We find that subsection 541(b) is also not a matter of serious consequence involving an important public interest.

Subsection 541(b) merely specifies (1) the delegation of authority within an agency, and (2) the place in which certain information is to be recorded.

We conclude, therefore, that sections 510(a)(1), 511 and 541(b) come within the "internal management" exemption and are not subject to the APA.

III. CONCLUSION

For the reasons set forth above, OAL finds that:

I. Section 538 (except subsection (b)), subsections 539(a) (second and third sentences), 540(b) and 541(a), (1) are "regulations" as defined in the APA, (2) are subject to the rulemaking requirements of the APA, and (3) are in violation of Government Code section 11347.5, subdivision (a).

II. Subsection 510(a)(1), section 511, and subsection 541(b) are "regulations"; however, they are exempt from the procedural requirements of the APA because they relate solely to the internal management of the Department.

III. Subsection 510(a)(2), sections 536 and 537, and subsections 538(b), 539(a) (first sentence), 539(b)-(d) and 540(a) are not "regulations" as defined in the APA because they are restatements of existing statutes, regulations and case law.

DATE: July 25, 1989

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1 This Request for Determination was filed by Edward Diamontiney, P. O. Box C-63046, Represa, CA 95671. The Department of Corrections was represented by Marc D. Remis, Staff Counsel, Legal Affairs Division, Department of Corrections, P. O. Box 942883, Sacramento, CA 94283-0001, (916) 445-0495.

To facilitate indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination is "358" rather than "1."

2 The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4. Since April 1986, the following published cases have come to our attention:

> Americana Termite Company, Inc. v. Structural Pest Control Board (1988) 199 Cal.App.3d 228, 244 Cal.Rptr. 693 (court found--without reference to any of the pertinent case law precedents--that the Structural Pest Control Board's licensee auditing selection procedures came within the internal management exception to the APA because they were "merely an internal enforcement and selection mechanism"); Association for Retarded Citizens --California v. Department of Developmental Services (1985) 38 Cal.3d 384, 396, n. 5, 211 Cal.Rptr. 758, 764, n. 5 (court avoided the issue of whether a DDS directive was an underground regulation, deciding instead that the directive presented "authority" and "consistency" problems); Boreta Enterprises, Inc. v. Department of Alcoholic Beverage Control (1970) 2 Cal.3d 85, 107, 84 Cal.Rptr. 113, 128 (where agency had failed to follow APA in adopting policy statement banning licensees from employing topless waitresses, court declined to "pronounce a rule in an area in which the Department itself is reluctant to adopt one," but also noted agency failure to introduce evidence in the contested disciplinary hearings supporting the conclusion that the forbidden practice was contrary to the public welfare and morals because it necessarily led to improper conduct), vacating, (1969) 75 Cal.Rptr. 79 (roughly the same conclusion; multiple opinions of interest as early efforts to grapple with underground regulation issue in license revocation context); California Association of Health Facilities v. Kizer (1986) 178 Cal.App.3d 1109, 224 Cal.Rptr. 247 (court ordered Department of Health

Services to comply with statute directing the establishment of subacute care program in health facilities and the adoption of regulations to implement the program); Carden v. Board of Registration for Professional Engineers (1985) 174 Cal.App.3d 736, 220 Cal.Rptr. 416 (admission of uncodified guidelines in licensing hearing did not prejudice applicant); City of Santa Barbara v. California Coastal Zone Conservation Commission (1977) 75 Cal.App.3d 572, 580, 142 Cal.Rptr. 356, 361 (rejecting Commission's attempt to enforce as law a rule specifying where permit appeals must be filed --a rule appearing solely on a form not made part of the CCR); Johnston v. Department of Personnel Administration (1987) 191 Cal.App.3d 1218, 1225, 236 Cal.Rptr. 853, 857 (Department of Personnel Administration's "administrative interpretation" regarding the protest procedure for transfer of civil service employees was not promulgated in substantial compliance with the APA and therefore was not entitled to the usual deference accorded to formal agency interpretation of a statute); National Elevator Services, Inc. v. Department of Industrial Relations (1982) 136 Cal.App.3d 131, 186 Cal.Rptr. 165 (invalidating internal legal memorandum informally adopting narrow interpretation of statute enforced by DIR); Newland v. Kizer (1989) 257 Cal.Rptr. 450 (mandate is proper remedy to require the Department of Health Services to adopt statutorily-mandated regulations regarding temporary operation of long-term health care facilities); Pacific Southwest Airlines v. State Board of Equalization (1977) 73 Cal.App.3d 32, 140 Cal.Rptr. 543 (invalidating Board policy that aircraft qualified for statutory common carrier tax exemption only if during first six months after delivery the aircraft was "principally" (i.e., more than 50%) used as a common carrier); People v. A-1 Roofing Service, Inc. (1978) 87 Cal.App.3d Supp. 1, 151 Cal.Rptr. 522, 527-528 (South Coast Air Quality Management District (SCAQMD) is not subject to the APA); Sangster v. California Horse Racing Board (1988) 202 Cal.App.3d 1033, 249 Cal.Rptr. 235 (Board decision to order horse owner to forfeit $38,000 purse involved application of a rule to a specific set of existing facts, rather than "surreptitious rulemaking"); and Wheeler v. State Board of Forestry (1983) 144 Cal.App.3d 522, 192 Cal.Rptr. 693 (overturning Board's decision to revoke license for "gross incompetence in . . . practice" due to lack of proper rule articulating standard by which to measure licensee's competence).

In a recent case, Wightman v. Franchise Tax Board (1988) 202 Cal.App.3d 966, 249 Cal.Rptr. 207, the court found that administrative instructions promulgated by the Department of Social Services, and requirements prescribed by the Franchise Tax Board and in the State Administrative Manual--which im-

plemented the program to intercept state income tax refunds to cover child support obligations and obligations to state agencies--constituted quasi-legislative acts that have the force of law and establish rules governing the matter covered. We note that the court issued its decision without referring to either:

> (1) the watershed case of Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1, which authoritatively clarified the scope of the statutory term "regulation"; or
>
> (2) Government Code section 11347.5.

The Wightman court found that existence of the above noted uncodified rules defeated a "denial of due process" claim. The "underground regulations" dimension of the controversy was neither briefed by the parties nor discussed by the court. [We note that, in an analogous factual situation involving the intercept requirements for federal income tax refunds, the California State Department of Social Services submitted to OAL (OAL file number 88-1208-02) in December 1988, Internal Revenue Service (IRS) Tax Refund Intercept Program regulations. These regulations were approved by OAL and filed with the Secretary of State on January 6, 1989, transforming the ongoing IRS intercept process, procedures and instructions contained in administrative directives into formally adopted departmental regulations.]

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy. Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.

See also, the following Opinions of the California Attorney General, which concluded that compliance with the APA was required in the following situations:

> Administrative Law, 10 Ops.Cal.Atty.Gen. 243, 246 (1947) (rules of State Board of Education); Workmen's Compensation, 11 Ops.Cal.Atty.Gen. 252 (1948) (form required by Director of Industrial Relations); Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56 (1956) (Department of Industrial Relations rules governing electrical wiring in trailer parks); Los Angeles Metropolitan Transit Authority Act, 32 Ops.Cal.Atty.Gen. 25 (1958) (Department of Industrial Relations's State Conciliation Service rules relating to certification of labor organizations and bargaining units); and Part-time Faculty as Members of Community College Academic Senates, 60 Ops.Cal.Atty.Gen. 174, 176 (1977) (policy of permitting

part-time faculty to serve in academic senate despite regulation limiting service to full-teachers). Cf. Administrative Procedure Act, 11 Ops.Cal.Atty.Gen. 87 (1948) (directives applying solely to military forces subject to jurisdiction of California Adjutant General fall within "internal management" exception); and Administrative Law and Procedure, 10 Ops.Cal.Atty.Gen. 275 (1947) (Fish and Game Commission must comply with both APA and Fish and Game Code, except that where two statutes are "repugnant" to each other and cannot be harmonized, Commission need not comply with minor APA provisions).

3 Title 1, California Code of Regulations (CCR) (formerly known as California Administrative Code), section 121, subsection (a) provides:

> "'Determination' means a finding by [OAL] as to whether a state agency rule is a regulation, as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the [APA] or unless it has been exempted by statute from the requirements of the [APA]." [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4 Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation['''] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter,

the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a [']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation[']as defined in subdivision (b) of Section 11342." [Emphasis added to highlight key language.]

[5] As we have indicated elsewhere, an OAL determination pursuant to Government Code section 11347.5 is entitled to great weight in both judicial and adjudicatory administrative proceedings. See 1986 OAL Determination No. 3 (Board of

Equalization, May 28, 1986, Docket No. 85-004), California Administrative Notice Register 86, No. 24-Z, June 13, 1986, p. B-22; typewritten version, pp. 7-8; Culligan Water Conditioning of Bellflower, Inc. v. State Board of Equalization (1976) 17 Cal.3d 86, 94, 130 Cal.Rptr. 321, 324-325 (interpretation of statute by agency charged with its enforcement is entitled to great weight). The Legislature's special concern that OAL determinations be given appropriate weight in other proceedings is evidenced by the directive contained in Government Code section 11347.5, subdivision (c): "The office shall . . . [m]ake its determination available to . . . the courts." [Emphasis added.]

6 Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. See Title 1, CCR, sections 124 and 125. The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

The Department submitted a Response to the Request for Determination on May 22, 1989, which was considered in this determination proceeding.

7 If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) (emphasis added) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute).

8 Pursuant to Title 1, CCR, subsection 127(a)(1), this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

9 We refer to the portion of the APA which concerns rulemaking

by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL for $3.00.

10 Penal Code section 5000.

11 Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778, 781.

12 Penal Code section 5054.

13 We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.

The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rule-

making agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

14 Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

15 See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

16 It is true that American Friends Service Committee v. Procunier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22, held that the APA did not apply to the Department of Corrections. However, Procunier's authority has been dramatically weakened. See 1989 OAL Determination No. 4 (State Water Resources Control Board and San Francisco Regional Water Quality Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1074-1076, 1080-1082; typewritten version, pp. 140-142, 146-148.

17 California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.

18 Id.

19 For instance, Government Code section 11346.7, subdivision (b) requires a "final statement of reasons" for each regulatory action.

20 Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, titled "Rules and Regulations of the Director of Corrections" (Title 15, Division 3, of the CCR), states in part:

> "Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures." [Emphasis added.]
>
> [This language first appeared in the CCR in May of 1976. (California Administrative Notice Register 76, No. 19, May 8, 1976, p. 401.) The Preface, and the quotation, were printed in the CCR in response to the legislative requirement stated in section 3 of Statutes of 1975, chapter 1160, page 2876 (the uncodified statutory language accompanying the 1976 amendment to Penal Code section 5058). As shown by the dates, this language was added to the CCR prior to the decision in Armistead v. State Personnel Board ((1978) 22 Cal.3d 198, 149 Cal.Rptr. 1) and subsequent case law, prior to the creation of OAL, and prior to the enactment of Government Code section 11347.5.]

The Departmental Administrative Manual makes clear in general that local institutions are expected to strictly adhere to the supplementary rules appearing in departmental procedural manuals, and specifically requires that local operations plans are to be consistent with the statewide procedural manuals.

According to section 102(a) of the Administrative Manual:

> "[i]t is the policy of the Director of Corrections that all institutions . . . under the jurisdiction of the Department . . . shall . . . observe and follow established departmental goals and procedures as reflected in departmental manuals . . . ." [Emphasis added.]

Section 240(c) of the Administrative Manual states:

> "While the policies and procedures contained in the procedural manuals are as mandatory as the Rules and Regulations of the Director of Corrections, the directions given in a manual shall avoid use of the words 'rule(s)' or 'regulation(s)' except to refer to the Director's Rules or the rules and regulations of another governmental agency." [Emphasis added.]

21 Stoneham v. Rushen (Stoneham I) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen (Stoneham II) (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20.

22 Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.

23 These adverse decisions concerning regulatory "second tier" material have not been unexpected. The author of the successful 1975 bill rejected an amendment proposed by the Department which would have specifically excluded the statewide procedural manuals from the APA adoption requirement. Later, a Youth and Adult Correctional Agency bill analysis dated May 5, 1981, unsuccessfully opposed AB 1013, the bill which resulted in the enactment of Government Code section 11347.5. This analysis contained a warning that the proposed legislation "could result in a great part of our [i.e., Department of Corrections'] procedural manuals going under the Administrative Procedure Act process . . . ."

24 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-74.

25 1987 OAL Determination No. 15 (Department of Corrections, November 19, 1987, Docket No. 87-004), California Administrative Notice Register 87, No. 49-Z, December 4, 1987, p. 872 (sections 7810--7817, Administrative Manual); 1988 OAL Determination No. 2 (Department of Corrections, February 23, 1988, Docket No. 87-008), California Regulatory Notice Register 88, No. 10-Z, March 4, 1988, p. 720 (chapters 2900 and 6500, sections 6144, Administrative Manual); 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, p. 1682 (Chapter 7300, Administrative Manual).

Portions of the above noted chapters and sections were found not to be "regulations."

26 1988 OAL Determination No. 19 (Department of Corrections, November 18, 1988, Docket No. 87-026), California Regulatory Notice Register 88, No. 49-Z, December 2, 1988, p. 3850 (subsections 1002(b) and (c), and 1053(b) of the Case Records Manual were found to be regulatory; subsections 1002(a) and (d), and 1053(a) were found not to be regulatory). 1989 OAL Determination No. 3 (Department of Corrections, February 21, 1989, Docket No. 88-005), California Regulatory Notice Register 89, No. 9-Z, March 3, 1989, p. 556 (Chapters 100 through

1900, noninclusive, of the Case Records Manual were found to be regulatory except for those sections which were either nonregulatory or were restatements of existing statutes, regulations, or case law).

27 These operations plans are authorized in a duly-adopted regulation. Title 15, CCR, section 3380, subsection (c), specifically provides:

> "Subject to the approval of the Director of Corrections, wardens, superintendents and parole region administrators will establish such operational plans and procedures as are required by the director for implementation of regulations and as may otherwise be required for their respective operations. Such procedures will apply only to the inmates, parolees and personnel under the administrator." [Emphasis added.]

Section 242 ("Local Operational Procedures") of the Administrative Manual provides in part:

> "Each institution . . . shall operate in accordance with the departmental procedural manuals, and shall develop local policies and procedures consistent with departmental procedures and goals.
>
> "(a) Each institution . . . shall establish local procedures for all major program operations.
>
> ". . . .
>
> "(b) Procedures shall be consistent with laws, rules, and departmental administrative policy. . . ." [Emphasis added.]

These sets of rules issued by individual wardens or superintendents are known variously as "local operational procedures," "operations plans," "institutional procedures," and other similar designations. (See Administrative Manual section 242(d).) We simply refer to these documents as "operations plans."

28 The Department is currently in the process of reviewing all existing procedural manuals and operations plans, with the objective of (1) transferring all regulatory material from manuals into the CCR, (2) combining all six existing manuals into a single more concise "Operations Manual," and (3) eliminating the duplicative material in the local "operations plans," while retaining in these plans material concerning unique local conditions.

29 Register 89, No. 14-Z, p. 893.

30 See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

31 Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

32 Stoneham v. Rushen I (1982) 137 Cal.App.3d 729, 735, 188 Cal.Rptr. 130, 135; Stoneham v. Rushen II (1984) 156 Cal.App.3d 302, 309, 203 Cal.Rptr. 20, 24; Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125.

33 Agency's Response, p. 1.

34 Agency's Response, p. 1.

35 Id., p. 2.

36 (1941) 312 U.S. 546, 61 S.Ct. 640, 85 L.Ed. 1034.

37 Gobert, et al., Rights of Prisoners (1981), pp. 25-26, citing Ex parte Hull, id.

38 See also In re McNally (1956) 144 Cal.App.2d 531, which finds that one imprisoned is still liable to be sued, and this liability necessarily carries with it the right to defend, but the prisoner is not entitled to be personally present at any part of the proceedings.

39 See California Regulatory Notice Register 89, No. 21, May 26, 1989.

40 See California Regulatory Notice Register 88, No. 7, February 13, 1988. Before it was repealed, section 3003 provided in part "Every person under the jurisdiction of the Department

of Corrections has the right to appeal decisions, conditions, or policies affecting his or her welfare. . . ."

41 Gobert, et al., Rights of Prisoners (1981), p. 61.

42 See note 37, supra.

43 Id., 312 U.S. at p. 549.

44 See generally, Gobert, et al., Rights of Prisoners (1981), chapter 2, "Right of Access to Courts," pp. 22-61.

45 Agency's Response, p. 2.

46 See note 44, supra, section 2.07, pp. 38-44, and in particular, p. 39, citing to Bounds v. Smith (1977) 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72.

47 In a prior determination, OAL held that section 7309 of the Administrative Manual, concerning the abuse of the inmates' appeal (grievance) procedure, was also "regulatory." See 1989 OAL Determination No. 6 (Department of Corrections, April 19, 1989, Docket No. 88-008), California Regulatory Notice Register 89, No. 18-Z, May 5, 1989, p. 1293, n. 33, item no. 6; typewritten version, n. 33, item no. 6.

48 The following provisions of law may permit rulemaking agencies to avoid the APA's requirements under some circumstances:

a. Rules relating only to the internal management of the state agency. (Gov. Code, sec. 11342, subd. (b).)

b. Forms prescribed by a state agency or any instructions relating to the use of the form, except where a regulation is required to implement the law under which the form is issued. (Gov. Code, sec. 11342, subd. (b).)

c. Rules that "[establish] or [fix] rates, prices or tariffs." (Gov. Code, sec. 11343, subd. (a)(1).)

d. Rules directed to a specifically named person or group of persons and which do not apply generally throughout the state. (Gov. Code, sec. 11343, subd.

(a)(3).)

e. Legal rulings of counsel issued by the Franchise Tax Board or the State Board of Equalization. (Gov. Code, sec. 11342, subd. (b).)

f. There is limited authority for the proposition that contractual provisions previously agreed to by the complaining party may be exempt from the APA. City of San Joaquin v. State Board of Equalization (1970) 9 Cal.App.3d 365, 376, 88 Cal.Rptr. 12, 20 (sales tax allocation method was part of a contract which plaintiff had signed without protest); see Roth v. Department of Veterans Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552 (dictum); Nadler v. California Veterans Board (1984) 152 Cal.App.3d 707, 719, 199 Cal.Rptr. 546, 553 (same); but see Government Code section 11346 (no provision for non-statutory exceptions to APA requirements); see International Association of Fire Fighters v. City of San Leandro (1986) 181 Cal.App.3d 179, 182, 226 Cal.Rptr. 238, 240 (contracting party not estopped from challenging legality of "void and unenforceable" contract provision to which party had previously agreed); see Perdue v. Crocker National Bank (1985) 38 Cal.3d 913, 926, 216 Cal.Rptr. 345, 353 ("contract of adhesion" will be denied enforcement if deemed unduly oppressive or unconscionable).

The above is not intended as an exhaustive list of possible APA exceptions. Further information concerning general APA exceptions is contained in a number of previously issued OAL determinations. The quarterly Index of OAL Regulatory Determinations is a helpful guide for locating such information. (See "Administrative Procedure Act" entry, "Exceptions to APA requirements" subheading.)

The Determinations Index, as well as an order form for purchasing copies of individual determinations, is available from OAL (Attn: Kaaren Morris), 555 Capitol Mall, Suite 1290, Sacramento, CA 95814, (916) 323-6225, ATSS 8-473-6225. The price of the latest version of the Index is available upon request. Also, regulatory determinations are published every two weeks in the California Regulatory Notice Register, which is available from OAL at an annual subscription rate of $108.

49 See Armistead v. State Personnel Board (1978) 22 Cal.3d 198, 149 Cal.Rptr. 1; Stoneham v. Rushen (Stoneham I) (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Poschman v. Dumke (1973) 31 Cal.App.3d 932, 107 Cal.Rptr. 596; 1987 OAL Determination No. 13 (Board of Prison Terms, September 30, 1987, Docket No. 87-002) California Administrative Notice Register 87, No. 42-Z, October 16, 1987, pp. 451-453, typewritten version pp. 7-

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50 Id., Armistead, Stoneham I, and Poschman. See also 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 8, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, p. B-13; typewritten version, p. 6.

51 See Poschman, note 49, supra, 31 Cal.App.3d at 943, 107 Cal.Rptr. at 603; and Armistead, note 49, supra, 22 Cal.3d at 203-204, 149 Cal.Rptr. at 3-4. See also 1989 OAL Determination No. 5 (Department of Corrections, Docket No. 88-007), California Regulatory Notice Register, No. 23-Z, April 21, 1989, pp. 1120, 1126-1127; typewritten version, pp. 192-193.

52 See Poschman, note 49, supra.

53 Id., 31 Cal.App.3d at 943, 107 Cal.Rptr. at 603.

54 See Armistead, note 49, supra.

55 Id., 22 Cal.3d at 203-204, 149 Cal.Rptr. at 3-4.

56 (1981) 123 Cal.App.3d 583, 587-588, 176 Cal.Rptr. 717, 718-719.

57 See Stoneham I, note 49, supra, 137 Cal.App.3d at 736, 188 Cal.Rptr. at 135.

58 See also Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rptr. 122, 125, in which the Court held that Chapter 4600 of the Department of Corrections' Administrative Manual was a "regulation" and was not a rule of internal management because it "significantly affect[ed] the male prison population in the custody of the department."

59 1988 OAL Determination No. 3 (State Board of Control, March 7, 1988, Docket No. 87-009), California Regulatory Notice Register 88, No. 12-Z, March 18, 1988, pp. 855, 864; typewritten version, p. 10.

60 Government Code section 13959.

61 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, pp. 1682, 1685; typewritten version, p. 4.

62 We wish to acknowledge the substantial contribution of Unit Legal Assistant Kaaren Morris and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.